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COURT OF APPEALS  
DIVISION II

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NO. 37539-7-II

STATE OF WASHINGTON

BY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY EDWARD HAGER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John R. Hickman

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REPLY BRIEF OF APPELLANT

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VALERIE MARUSHIGE  
Attorney for Appellant

23619 55<sup>th</sup> Place South  
Kent, Washington  
(253) 520-2637

P.M. 2-24-09

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HAGER'S MOTION FOR A MISTRIAL WHERE DETECTIVE CALLAS GAVE IMPROPER OPINION TESTIMONY AS TO HAGER'S GUILT IN VIOLATION OF THE COURT'S PRETRIAL ORDER AND THE COURT'S DEFICIENT INSTRUCTION FOR THE JURY TO DISREGARD THE TESTIMONY FAILED TO CURE THE PREJUDICIAL EFFECT OF THE TESTIMONY.

The State acknowledges that Detective Callas' testimony that Hager was "evasive" was improper because of the court's pretrial order, but argues that it "is not equivalent to a statement that the defendant is lying." Brief of Respondent at 12. The State's argument, based on its misapprehension of the Washington Supreme Court's analysis in State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001), is highly misguided. In Demery, the Supreme Court resolved whether statements made by police officers in a taped interview accusing the defendant of lying constituted impermissible opinion testimony. Id. at 758. The Supreme Court recognized that "when a law enforcement officer gives opinion testimony, the jury is especially likely to be influenced by that testimony." Id. at 763. The Supreme Court emphasized that an "officer's live testimony" offered during trial may often carry "an aura of special reliability and trustworthiness." Id. However, the Supreme Court concluded that statements made by police officers during a taped interview accusing the

defendant of lying do not carry this aura of reliability because such statements are not testimony but part of a police technique used to determine whether suspects will change their story during the course of an interview. Id. at 765. Contrary to the State's assertion, under the reasoning in Demery, Callas' opinion testimony was particularly prejudicial because it carried an aura of special reliability and trustworthiness.

Furthermore, as conceded by the State, Callas' opinion testimony violated the trial court's explicit pretrial order. This violation was especially egregious given the fact that Callas should have been aware of the court's pretrial order because he testified in the first trial just three months earlier. The record reflects that during pretrial motions in the first trial, the court granted the defense's motion to exclude any testimony from Callas regarding Hager's deceptive or evasive behavior. 6RP 154-58. Consequently, the record belies the court's belief that Callas was not "acting in bad faith in terms of violating the rule." 8RP 434.

As the Washington Supreme Court emphasized in State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996), the courts "do not condone cavalier violation of trial court pretrial rulings" and such violations may be "so flagrantly prejudicial as to be incurable by instruction." Accordingly, in light of Callas' flagrant violation of the court's pretrial order and the

court's deficient instruction that compounded the prejudicial effect of Callas' opinion testimony, Hager is entitled to a new trial.

2. SHOULD THIS COURT CONCLUDE THAT REVERSAL IS NOT REQUIRED, THIS CASE MUST BE REMANDED FOR RESENTENCING.

Should this Court conclude that reversal is not required, this case must be remanded to the trial court for resentencing given the State's concession that it is familiar with State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008). Brief of Respondent at 16. In Bahl, the Washington Supreme Court remanded for resentencing, concluding that "the restriction on accessing or possessing pornographic materials is unconstitutionally vague." Id. at 758, 762. The Supreme Court pointed out that the fact that the condition provides that the "community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its fact it does not provide ascertainable standards for enforcement." Id. at 758. It is irrefutable that Hager's judgment and sentence ordering community custody erroneously imposes the same unconstitutionally vague condition and consequently no further argument is required. CP 72.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Hager's conviction.<sup>1</sup>

DATED this 24<sup>th</sup> day of February, 2009.

Respectfully submitted,

  
VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant

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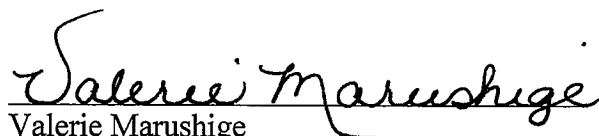
<sup>1</sup> It should be noted that the State's designation of the transcript of the 404 (B) hearing from the first trial violates RAP 9.6 (a), which states, "Each party is encouraged to designate only clerk's papers and exhibits needed to review the issues presented to the appellate court." The transcript clearly has no relevance to the issues raised on appeal and has been provided to the Court for the obvious purpose of portraying Mr. Hager as a person of bad character with the propensity to commit the alleged crime.

### DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Michelle Luna-Green, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 24<sup>th</sup> day of February, 2009 in Kent, Washington.



Valerie Marushige  
Attorney at Law  
WSBA No. 25851

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